No. 21,981

United States Court of Appeals

For the Ninth Circuit

BENJAMIN F. MARLOWE,
Appellant,

vs.

J. FRANK COAKLEY, LOWELL JENSEN and C. HERBERT,
Appellees.

APPELLEES' BRIEF

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STATEMENT OF FACTS

This is an appeal from an order of dismissal (CT page 31) made after hearing on a duly noticed motion (CT page 17).

The essence of appellant's allegations is that appellees "presented to the Grand Jury . . . perjured testimony" and "did not present a full and true picture of all facts before said Grand Jury." (CT page 10, lines 7-8, 10-11) More specifically, appellant alleges that appellees "permitted Margaret Buerk to falsely testify" before the Grand Jury and that "the testimony given by said Margaret Buerk was false and malicious." (CT page 10, lines 24, 28-29) These allegations are repeated in somewhat different form elsewhere in the complaint: "did not bring forth from

said witnesses before the said Grand Jury the fact within the knowledge of said witnesses" (CT page 11, lines 5-6); "wilfully and deliberately suppressed evidence within their knowledge." (CT page 11, lines 22-23)[1]

Although not specifically so stated in the order of dismissal, the dismissal was undoubtedly based on the immunity of appellees insofar as it pertains to the first and second causes of action. These were the only grounds argued in appellees' reasons and authorities (CT pages 19-22) and argued at the hearing of the motion.[2]

The grounds argued for dismissal as to the third alleged cause of action were lack of jurisdiction in the United States District Court (CT pages 22-23) and failure to state facts sufficient to constitute a claim (CT page 23).

ISSUE

The sole issue before this Court is whether, under the circumstances of this case, appellees are immune from liability.[3]

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[1]The alleged second cause of action is essentially the same as the alleged first cause of action with a substitution of allegations of "gross negligence" in place of allegations of "wilfull and deliberate" conduct. (CT page 13, lines 10-21)

The alleged third cause of action, against appellee J. Frank Coakley only, seems to be basically an attempt to allege slander. It apparently has no relationship to the first two alleged causes of action except the identity of one appellee. (See CT pages 14-15)

[2]Contrary to appellant's assertion (Appellant's Opening Brief, page 7, lines 15-19), appellees have not relied on and do not now rely on Section 821.6 of the California Government Code.

[3]Appellant does not argue in his opening brief that the dismissal of the alleged third cause of action was improper.

APPELLEES ARE IMMUNE

The Supreme Court held in *Tenney v. Brandhove,* 341 U.S. 367 (1951) that the traditional common law immunities were not abrogated by the Civil Rights Act. The immunity of prosecuting officials is well established throughout the federal court system. The rationale of this immunity is well expressed by Judge Learned Hand:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.

> In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .
>
> The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise the power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. [*Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949) quoted with approval in *Barr v. Matteo,* 360 U.S. 564, 571-72 (1959)]

In this Circuit, the doctrine of immunity of prosecuting officials has been recognized in *Agnew v. Moody,* 330 F.2d 868 (9th Cir 1964), in *Harmon v. Superior Court,* 329 F.2d 154 (9th Cir 1964) and in *Sires v. Cole,* 320 F.2d 877 (9th Cir 1963).

Appellant argues that the cases establishing immunity of prosecuting officials "are clearly distinguishable on [their] facts from the case at bar." (Appellant's Opening Brief, page 5, lines 5-6) Appellant does not, however, distinguish them.

Appellant apparently argues that *Robichaud v. Ronan,* 351 F.2d 533 (9th Cir 1965) is controlling. The *Robichaud* case involved allegations that the prosecuting official therein involved, among other things, participated in a wrongful attempt to coerce a confession from the plaintiff. In the *Robichaud* case, the defendant was denied immunity because the defendant had allegedly participated in acts beyond his quasi-judicial capacity. "If he acts in the role of a policeman, then why should he not be liable, as is the policeman . . .?" (351 F.2d at 536)

The *Robichaud* case did not overrule any of the former cases holding that "prosecuting attorneys, in acting as quasi-judicial officers, should enjoy the same immunity from civil liability as that which protects a judge." (351 F.2d at 536) It merely held that the immunity does not extend to acts which are not within the quasi-judicial function. (351 F.2d 537-38)

Robichaud v. Ronan has no application to this case. In this case, the complaint shows that in doing the acts alleged, appellees were acting in a quasi-judicial role. All of the acts complained of were done in pursuance of appellees' duty to assist the grand jury in its inquiry and, if an indictment is returned, to prosecute the person against whom the indictment is brought. The allegations of the complaint (CT pages 8-13) make it clear that appellees in no way abandoned their quasi-judicial function.

Appellant's primary theory seems to be that his allegations of improper intent and malice negate appellees' immunity. Appellant's unfounded allegations

cannot aid him, however, in his attempt to bring the alleged acts of appellees out of the area of quasi-judicial action.

> . . . it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation [that the official's act must have been within the scope of his powers] without defeating the whole doctrine. [*Barr v. Matteo,* 315 U.S. 564, 572 (1959); *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir 1949)]
>
> The claim of an unworthy purpose does not destroy the privilege. [*Tenney v. Brandhove,* 341 U.S. 367, 377 (1951)]

CONCLUSION

The acts alleged were clearly and uncontrovertibly within the quasi-judicial function of appellees. The order of dismissal should be affirmed.

Dated, San Francisco, California,
November 29, 1967.

Respectfully submitted,
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By EDWIN A. HEAFEY, JR.,
Attorneys for Appellees.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Edwin A. Heafey, Jr.,
Attorney.